BEFORE THE FLORIDA JUDICIAL QUALIFICATIONS COMMISSION

INQUIRY CONCERNING A

JUDGE, No. 04-239,

JUDGE RICHARD H. ALBRITTON, JR.

Florida Supreme Court

Case No. SC05-851

_____/

MEMORANDUM IN OPPOSITION TO PETITION FOR REVIEW OF ORDER ON MOTIONS TO COMPEL

COMES NOW the undersigned, as Special Counsel to the Judicial Qualifications Commission ("JQC") and responds to Honorable Richard H. Albritton, Jr.'s Petition for Review of Order on Motions to Compel as follows:

I. INTRODUCTION

Judge Albritton has petitioned the full Hearing Panel of the JQC to review Judge Wolf's Order on Motions to Compel dated January 26, 2006 and has asked the Hearing Panel to (a) compel the Special Counsel of the JQC ("Special Counsel") to disclose privileged work product material not within the ambit of Rule 12(b), and (b) permit him to continue refusing to sit for a deposition until the privileged information is produced to him. Judge Albritton's petition should be denied on both points.

Contrary to Judge Albritton's arguments, he has no entitlement to the requested documents because they are protected by the work product privilege, and are not "statements" as defined by JQC Rule 12(b) and the Florida Rules of Civil Procedure. Judge Albritton's Petition relies heavily upon *Inquiry Concerning a Judge, Gayle S. Graziano*, 696 So. 2d 744 (Fla. 1997) in support of his argument. However, *Graziano*, when read it its entirety, supports the position taken by the JQC and confirms that the Judge is only entitled to production of information

pursuant to Rule 12(b), and not privileged information provided to the Investigative Panel of the JQC as he asserts. Quite simply, the Judge is not entitled to review the work product of the JQC's special investigator unless and until he makes an appropriate showing of prejudice. *Graziano* affirms rather than repudiates this proposition.

Additionally, Judge Albritton's contention that the JQC should be forbidden from taking his deposition until such time as he has had access to the privileged work product material that the JQC has withheld from production finds no support in the law. To the contrary, pursuant to Florida Rule of Civil Procedure 1.280(d) a party may not condition the availability of a witness for deposition upon the other party's invocation of a privilege in response to a discovery request. The Judge may not continue to refuse to appear for deposition on the grounds he has advanced.

Judge Albritton's Petition should be denied, and he should be compelled to appear for deposition so that this case may move forward.

II. STATEMENT OF RELEVANT FACTS

A. Facts Relevant to Judge Albritton's Motion to Compel.[1]

Prior to the JQC filing formal charges against Judge Albritton, it undertook an investigation into complaints against Judge Albritton filed by various individuals. As part of its investigation, the JQC retained the services of Robert W. Butler, a former FBI agent and licensed private investigator. As part of his investigation of Judge Albritton, and in anticipation of a proceeding against Judge Albritton, Mr. Butler interviewed individuals believed to have information regarding Judge Albritton's misconduct. Prior to the interviews with these individuals, Mr. Butler informed them that the interviews would be confidential and that they

[1] The factual statements in this section are verified in the Affidavit of Robert W. Butler previously filed in this proceeding.

were being conducted as part of an investigation into allegations of misconduct by Judge Albritton.

Mr. Butler took handwritten notes during the interviews he conducted. The notes that Mr. Butler took were not a verbatim account of the interview but were a summary to assist the investigation. The notes were later used, in conjunction with Mr. Butler's thoughts and mental impressions to prepare typewritten summaries of each interview.

Mr. Butler provided copies of these typed interview summaries to Thomas C. McDonald, Jr., General Counsel to the JQC, who later submitted them to the Investigative Panel of the JQC, prior to its finding of probable cause to institute formal charges against Judge Albritton. The interview summaries have never been introduced as evidence in any proceeding. Furthermore, the JQC has not listed the interview summaries as evidence to be used before the Hearing Panel, nor does Special Counsel anticipate that these summaries will be offered as evidence.

B. Facts Relevant to the JQC's Motion to Compel.[2]

The JQC filed its Notice of Formal Charges in this matter on May 19, 2005. Within one week, the JQC's Special Counsel ("Special Counsel") began responding to discovery requests from Judge Albritton's original counsel. In early June, 2005, Special Counsel also verbally asked for deposition dates for Judge Albritton from his initial counsel, Mr. Harper. Mr. Harper advised that he was going on vacation and that he would provide deposition dates on his return. In a letter dated June 29, 2005, Special Counsel for a **second** time requested Petitioner's counsel to inform him of available dates to schedule Judge Albritton's deposition. There was no response to this request and shortly after the June 29th letter was sent, Judge Albritton retained new counsel to represent him in this cause.

[2] The facts contained in this section are verified in the accompanying Affidavit of Special Counsel David T. Knight and are substantially identical to the JQC's response to Judge Albritton's Motion for Attorney's Fees.

Judge Albritton's new counsel requested an additional extension of time to respond to the Notice of Formal Charges and Special Counsel advised that he had no objection. The new counsel, Mr. Tozian, then requested and received additional extensions to respond to the Formal Charges, which he did on July 25, 2005. In a letter dated August 19, 2005, Special Counsel again responded to Judge Albritton's new counsel's discovery requests by reproducing documents previously disclosed to Petitioner's former counsel. At the same time, Special Counsel, for a **third** time, repeated the request to depose Judge Albritton at dates of his convenience in September. Again, on September 1, 2005, Special Counsel asked for a **fourth** time to arrange a deposition date for Judge Albritton.

On September 6, 2005, the JQC issued an Amended Notice of Formal Charges. In late September, 2005, Judge Albritton's counsel, in response to the **fifth** request from the JQC to depose the Petitioner, advised Special Counsel that Judge Albritton would be unwilling to agree to dates for the deposition prior to the JQC producing certain privileged materials prepared by the JQC in the course of its investigation of Judge Albritton. Having exhausted efforts to informally arrange for Judge Albritton's deposition without acceding to his demands for the production of privileged materials, in November, 2005, both parties filed motions to compel, with the JQC asking that Judge Albritton be required to sit for a deposition and the Judge asking for the production of privileged materials.

In spite of Judge Albritton's unwillingness to submit to a deposition, the JQC has been willing to allow him to proceed with taking any deposition he wishes. The Judge has already completed two depositions, and has advised that many more are planned. At no time has the JQC failed to timely provide documents provided by Rule 12(b) – over 300 pages to date – or failed to promptly cooperate with the Judge's wish to take depositions. The one, and only,

discovery dispute between the parties has related to Judge Albritton's refusal to sit for depositions unless privileged materials were first provided to him.

On January 26, 2006, Judge Wolf announced his ruling on the pending motions, granting the JQC's motion and denying Judge Albritton's motion. Once again, the JQC tried to obtain dates for Judge Albritton's deposition shortly following the ruling, and once again he has refused to appear.

III. ARGUMENT

A. Judge Albritton's Motion To Compel

Judge Albritton's Motion for Rehearing raises the issue of whether he is entitled to receive, under JQC Rule 12(b), the confidential interview summaries of potential witnesses which were taken by the JQC's investigator. The JQC claims that these summaries are privileged, and Judge Albritton argues that they must be produced based upon the Florida Supreme Court's interpretation of Rule 12(b) in *Graziano*. The great reliance that the Judge places upon *Graziano*, however, is misplaced.

In *Graziano*, the Florida Supreme Court upheld the removal of a judge from the bench, and rejected the various grounds raised by the judge in an effort to overturn the JQC's recommendation for removal. In spite of the holding, Judge Albritton seizes upon an isolated passage of the opinion and then proceeds to mischaracterize its reach. The issue in *Graziano* relevant to this case was whether the confidential complaint to the JQC about the judge's conduct was discoverable. In the passage of the opinion relied upon by Judge Albritton, the Court held that the confidential complaint was not discoverable, but held that the judge was

nevertheless entitled to discovery of the facts underlying the charges, stating:

> Although not allowing for discovery of the complaint itself, discovery pursuant to Rule 12(b) allows the accused judge to have full access to the **evidence upon which formal charges are based.**

(emphasis added).

In *Graziano*, no issue was raised about confidential witness summaries, like those involved in this case. The only document at issue was the confidential complaint, which the Court held was not subject to discovery. As a consequence, when the Court stated that the judge could have full access to the "evidence" upon which formal charges were based, it certainly was not speaking to the confidential information considered by the Investigative Panel of the JQC. In the context of the opinion, it is clear that the Court was assuring the judge that he could receive the broad discovery rights **permitted** under Rule 12. The Court did not give the judge the right to obtain confidential complaints or otherwise abrogate the law relating to work product privilege.

Moreover, JQC Rule 12(a) specifically provides that the Florida Rules of Civil Procedure will apply, unless otherwise preempted by the JQC Rules. These civil procedure rules specifically recognize the work product privilege that the JQC is invoking. Fla. R. Civ. P. 1.280(b)(3). Consistent with this rule, Judge Wolf found that the confidential witness summaries in this case were protected, unless Judge Albritton could demonstrate prejudice.

As a second ground, Judge Albritton has attempted to equate the confidential witness summaries involved in this case with "written statements" as that term is used in Rule 12(b), and the discovery of which was apparently permitted in the Florida Supreme Court's opinion in the unpublished *Holloway* decision which required that written "statements" of witnesses must be

produced. The confidential summaries in this case, however, certainly do not qualify as "written statements."

The typed witness interview summaries requested by Judge Albritton are not statements, as that term is defined by the Florida Rules of Civil Procedure. Rule 12(a) of the Florida JQC Rules provides that "[i]n all proceedings before the Hearing Panel, the Florida Rules of Civil Procedure shall be applicable except where inappropriate or as otherwise provided by these rules." Because the Florida JQC Rules do not define the meaning of the term "statement," reference to the Florida Rules of Civil Procedure is the appropriate way to give further meaning to the undefined term.

Rule 1.280 (b)(3) of the Florida Rules of Civil Procedure defines a statement as "a written statement signed or otherwise adopted or approved by the person making it, or a stenographic, mechanical, electrical, or other recording or transcription of it that is substantially verbatim recital of an oral statement by the person making **and contemporaneously recorded**." (Emphasis added). This rule clearly limits the definition of a statement to either a written document signed by the person to whom it is attributed or a simultaneous transcription of that person's verbal statement or statements, such as a transcript prepared by a court reporter or stenographer. The documents that are the subject of Judge Albritton's request are obviously not "written statement[s] signed … by the person making [them]." Therefore, Judge Albritton is asserting that the typed witness interview summaries prepared by the JQC's investigator are substantially similar to a deposition or court transcript. This argument is wholly unpersuasive. Not only were the typed summaries not "contemporaneously recorded," as required by Rule 1.280(b)(3), but they also are not "substantially verbatim recital[s]" of the oral statements made by the witnesses. The summaries were prepared hours or even days later by the JQC's

investigator and consist of a mixture of both the investigator's impression of the witnesses' words and the Investigator's thoughts and mental impressions. (*See* Affidavit of Robert W. Butler). Documents of this character do not meet the definition of "statement" contained in Rule 1.280(b)(3).

Additional insight into the meaning of the term "statement" can be had by reference to Florida case law interpreting the meaning of that term in substantially analogous provisions of the Florida Rules of Criminal Procedure. Rule 3.220 of the Florida Rules of Criminal Procedure formerly defined a statement precisely as Rule 1.280(b)(3) of the Civil Rules of Procedure defines a statement. In *State v. Latimore*, 284 So.2d 423 (Fla. 3d DCA 1973), the Third District Court of appeal held that "investigation reports which do not quote a person … directly and never are signed or shown to that person are not statements [as defined by the rule] and thus are not subject to discovery." *Id.* 284 So. 2d at 425. In so holding, the *Latimore* court looked not only to the United States Court of Appeals definition of statements but also cited other Florida cases which were in accord with its holding. *See United States v. Graves*, 428 F.2d 196 (5th Cir. 1970); *State v. Gillespie*, 227 So. 2d 550 (Fla. 2d DCA 1969); *Darrigo v. State*, 243 So. 2d 171 (Fla 2d DCA 1971).

In response to these decisions, Florida Rule of Criminal Procedure 3.220 was substantially amended and the definition of "statement" was changed so as to explicitly include police reports and witness interview summaries. The rule now provides, in pertinent part, "[t]he term 'statement' as used herein includes a written statement made by the person and signed or otherwise adopted or approved by the person and also includes any statement of any kind or manner made by the person and written or recorded or summarized in any writing or recording." Fla. R. Crim. P. Rule 3.220(B). Thus, in sharp contrast to Rule 3.220 of the Florida Rules of

Criminal Procedure, the rules which apply to JQC proceedings specifically do not define statement so broadly. The only conclusion that can be drawn from this contrast is that the scope of discoverable statements under the Civil Procedure rules, which are specifically adopted by the JQC rules, does not include summaries of witness interviews.

Even if the typed witness interview summaries sought by Judge Albritton are found to be "written statements" and within the meaning of Rule 12(b), they are work product and, thus, protected by privilege. The work product privilege "is designed to promote the adversary system by protecting an attorney's trial preparations, not necessarily from the rest of the world, but from an opposing party in litigation." *Visual Scene, Inc. v. Pilkington Bros., Plc.*, 508 So. 2d 437, 442 (Fla. 3d DCA 1987).

Judge Albritton's argument that the work product privilege is inapplicable because the interview summaries were provided "as evidence"[3] to the Investigative Panel misses the mark. Judge Albritton argues that the witness summaries have lost their protected status of "work product" because they have been used in "trial." The Judge cites several cases that support this proposition, and the JQC has no quarrel with the ruling in those cases. It does take issue with the Judge's application of those rulings to the issues in this case. The proceeding before the Investigative Panel was not the "trial." That phase of this proceeding will be held before the Hearing Panel of the JQC.[4] Should the JQC wish to use the confidential witness summaries as evidence before the Hearing Panel, the summaries would clearly lose their protected status. That, however, has not happened and is not anticipated.

[3] It is hard to imagine how the confidential witness summaries could even be admitted as evidence, since they involve double hearsay.

[4] It is apparent that Judge Albritton recognizes this critical distinction, and in an effort to avoid it he repeatedly refers to the Investigative Panel as the "Investigative Hearing Panel," ignoring the clear distinction provided in the JQC Rules. See, e.g., the definitions in JQC Rule 2(2) and (3).

The interview summaries are precisely the type of material that fits within the classic definition of work product; material "prepared in anticipation of litigation or for trial" and is not discoverable absent a showing by the Judge that he "has need of the materials in the preparation of the case and is unable without undue hardship to obtain the substantial equivalent of the materials by other means." Fla. R. Civ. P. 1.280(b)(3). In his opinion denying Judge Albritton's motion to compel, Judge Wolf has wisely recognized the need to protect classic work product, but at the same time has left the door open for Judge Albritton to come back and seek further relief if he is unable to acquire the information contained in the confidential summaries by other means. This is the rule articulated in Florida Rule of Civil Procedure 1.280(b)(3), which applies to this proceeding. Fla. Jud. Q. R. 12(a).

As a secondary authority in support of his Petition, Judge Albritton cites to the Florida Supreme Court's decision in *Inquiry Concerning a Judge, Cynthia A. Holloway*, No. 00-143, Supreme Court Case No. SC00-2226. His reliance upon the *Holloway* case, however, is also misplaced because the Court specifically restricted the group of documents which the JQC had to produce to "statements" – which is exactly what Rule 12(b) allows a judge to received in discovery – stating: "[p]etitioner's Motion to Compel is hereby granted **only as to the statements** used in determining probable cause."

Nowhere did the Court in *Holloway* require the disclosure of the summaries of confidential witness interviews by the JQC. While Judge Albritton makes much of that fact that the Special Counsel in that case actually produced certain of the witness summaries, the Hearing Panel can certainly understand that decision by the Special Counsel was made for strategic reasons relating to the dynamics of that case. The fact remains that the *Holloway* court only required the production of "statements." All statements have been produced in this case.

Finally, important policy considerations outlined in the Florida Constitution and articulated by the Supreme Court in *Graziano* are implicated by Judge Albritton's petition. Article V, section 12(a)(4) of the Florida Constitution, as implemented by JQC Rule 23, provides that "the proceedings by or before the JQC are confidential until the JQC files formal charges with the clerk of [the Supreme Court]" *Graziano*, 696 So.2d at 751. Maintaining the confidentiality of investigatory stages of JQC proceedings protects Judges from being victimized by unsubstantiated charges and also serves the public's interest by permitting individuals to make complaints against Judges without fearing reprisal. *Id.* Furthermore, the JQC's special investigator, in compliance with JQC Rule 23, informed all witnesses whom he interviewed that the substance of their conversation would remain confidential. If the JQC is now ordered to disclose the typed interview summaries, that expectation of privacy will be violated as will the confidentiality policies that guide the JQC during the investigatory stage of its proceedings, and future investigations will be hamstrung.

Judge Albritton's Petition should be denied because the requested documents are not discoverable pursuant to Rule 12(b). Moreover, even if the requested documents are discoverable pursuant to Rule 12(b), they are protected by the work product privilege and accordingly, not discoverable absent a showing by Judge Albritton that he is unable to obtain the information by other means.

B. The JQC's Motion To Compel

Judge Albritton's Petition also argues that the full hearing panel should reverse Judge Wolf's order granting the JQC's motion to compel Judge Albritton's deposition. Regardless of the Hearing Panel's conclusion on Judge Albritton's motion to compel, the panel should deny

Judge Albritton's request to delay his deposition and should affirm Judge Wolf's order with respect to the JQC's motion to compel.

There is no basis under Florida law for Judge Albritton to condition the taking of his deposition upon the JQC's response to his request for production. Rule 1.280(d) of the Florida Rules of Civil Procedure provides that "methods of discovery may be used in any sequence" and that "the fact that one party is conducting discovery, whether by deposition or otherwise, shall not delay any other party's discovery." *See also,* Fla. R. Civ. P 1.280(c); *Deltona Corp. v. Bailey*, 336 So.2d 1163 (Fla. 1976) ("the trial court has the authority to regulate as well as to prevent the taking of depositions, but when this authority is exercised, it should be only upon a showing of good cause") (internal citations and quotations omitted). Accordingly, Judge Albritton "shall not delay," Fla. R. Civ. P. 1.280(d), the JQC's taking of his deposition based on his desire to have access to the privileged documents that the JQC has withheld from production without a showing of good cause.

Judge Albritton's argument that he can not adequately prepare for his deposition without access to those documents does not demonstrate good cause for delaying his deposition. Pursuant to Rule 12(b), the JQC has provided Judge Albritton with a list of all the witnesses it intends to call at his final hearing. Judge Albritton is free to take the depositions of any of the individuals listed by the JQC. Indeed, Judge Albritton has already begun to depose these witnesses and has additional depositions scheduled. These depositions, combined with the over 300 pages of documents produced by the JQC, the notice of formal charges and the Judge's own records and recollections should provide a more than adequate basis to prepare Judge Albritton for his deposition.

Even if Judge Albritton deemed these insufficient, the Judge was certainly free to employ other discovery procedures, such as interrogatories, to elicit the basis for the allegations in the formal charges, all without requiring disclosure of confidential and privileged information. As such, the suggestions by Judge Albritton that the JQC is somehow attempting to "trick" the Judge by conducting his deposition rings particularly hollow. The JQC has no objection to Judge Albritton using standard discovery procedures for the purposes discovery was intended for, to "narrow the issues" and clarify the allegations contained in the formal charges. Had Judge Albritton availed himself of the available discovery procedures he would have ample opportunity to prepare for his deposition and be fully briefed on the specifics which form the basis for the charges against him. Instead, Judge Albritton has tenaciously refused to sit for his deposition without access to confidential and privileged materials to which he has no right to under J Rule 12(b). As Judge Wolf correctly determined, there is no justification for Judge Albritton to condition his deposition upon the JQC's refusal to produce the requested documents and Judge Albritton's Petition for Review of Judge Wolf's order granting the JQC's motion to compel should be denied.

IV. CONCLUSION

For the foregoing reasons, Judge Albritton's Petition for Review of Order on motions to Compel should be denied.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail this ____ day of February, 2006 to:

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